THE ATTORNEY GENERAL OF TEXAS

JOHN L. HILL
ATTORNEY GENERAL

AUSTIN, TEXAS 78711

Records M-297

July 17, 1973

The Honorable Jerry A. Sandel
District Attorney
P. O. Box 1232
Huntsville, Texas 77340

Letter Advisory No. 55

Re: Dual employment-State College professor as Assistant District Attorney

Dear Mr. Sandel:

You have requested an opinion from this office concerning the legality of employing as an Assistant District Attorney a well qualified attorney who is presently employed as a professor at Sam Houston State University and whose hours there would permit him to also work in your office full time. You advise that you would pay his salary from a Criminal Justice Council grant for that purpose "and/or" Officers Salary Fund from the five counties constituting the Twelfth Judicial District.

District and County Attorneys are constitutional officers (Article 5, § 21, Constitution of Texas), and are elected statutory officers of the state exercising governmental powers. While it would seem that the duties and functions of these officers would clearly make them a part of the executive department and we would so hold, the Supreme Court in State v. Moore, 57 Tex. 307 (1882) held that they are of the judicial department and we are bound by that decision.

On the other hand, professors and teachers at state institutions such as Sam Houston State University are part of the executive branch of government. See Attorney General Opinion H-6 (1973) and Attorney General Letters Advisory Nos. 4, 20, 22, 23, and 30 (1973).

The Separation of Powers provision of the Texas Constitution (Article 2, § 1) provides, after directing that the powers of the State government shall be divided into three distinct departments (Legislative, Executive and Judicial), each to be confided to a separate body of magistracy:

> " . . . and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted."

A teacher, instructor or professor employed by a public institution of learning is "of" the executive department and ordinarily exercises a function implementing a governmental power, thus coming within the prohibition. Attorney General Opinion H-6 (1973).

But whether the professor involved here, in fact, exercises such an executive function is not controlling because an Assistant District Attorney, by definition, exercises governmental power in his judicial office. The exercise of a governmental power in either department works a bar. Hence, the two posts may not be constitutionally occupied by the same person at the same time unless a constitutional exception applies. See also Attorney General Opinion H-7 (1973).

Article 16, Section 40 of the Constitution as now constituted (following its amendment in 1972) provides an exemption from the Separation of Powers prohibition for certain military officers and men, and for officers of State soil and water conservation districts, and gives a limited exemption therefrom to State employees or other persons compensated by the State who are not State officers, insofar as it permits them to serve on local governmental bodies without compensation therefor. But neither of those exemptions apply here.

Another provision of the present Article 16, Section 40 allows non-elective State officers to hold other non-elective offices under certain circumstances, but only if "there is no conflict with the original office for which he receives salary or compensation." This provision is not as broad as the "military and soil and water conservation district" exemption of Section 40 which specifies that "nothing in this Constitution shall be construed to prohibit. . . ." We do not believe the "non-elective State officer " provision of Section 40 overrides the Separation of Powers provision of Article 2, Section 1. The "no conflict" clause argues against it. We are aware of no other applicable constitutional provision.

You have referred to Attorney General Opinion M-297 (1968) which concluded that a college professorship at a state university was not a "civil office of emolument" within the meaning of Article 16, Section 40 of the Constitution prior to its amendment but, rather, a "position of honor, trust or profit." The opinion concluded that a county attorney, an elected state officer, could act as such a professor provided he forewent compensation from the State Treasury for such services, since, it was said, Article 16, Section 33 of the Constitution, as it then read, did not prohibit the occupancy of two "positions of honor, trust or profit" though it prohibited payment of a State salary for both from the Treasury.

That opinion did not advert to the Separation of Powers provision of the Constitution, and we think it was erroneous in failing to apply that concept, which would have resulted in a different conclusion. For that reason, Opinion M-297 is overruled. Because the matter here is determined by the Separation of Powers doctrine (to which none of the constitutional exceptions here apply), it is unnecessary in this review for us to further analyze the basis upon which that opinion rested. But see Boyett v. Calvert, 467 S. W. 2d 205 (Tex. Civ. App., Austin, 1971), writ ref., n. r. e., app. dis'm. 405 U. S. 1035 (1972).

The fact situation here is to be distinguished from the circumstances with which Attorney General Letters Advisory Nos. 22 and 30 (1973) were concerned. Both of those Advisories involved professors at State universities filling what were essentially "consultant" roles of an impermanent, detached, and independent advisory nature in other governmental areas which did not cause them to be "of" other departments. Here, the contemplated employment is such that the professor would occupy a "position" or "office" as those terms are legally, not merely colloquially used. See Attorney General Opinion V-371 (1947).

You are accordingly advised that, in our opinion, the employment as an Assistant District Attorney of a person currently employed as a professor at Sam Houston State University is constitutionally prohibited.

Very truly yours,

John L. Hill

JOHN L. HILL
Attorney General of Texas

APPROVED:

LARRY F. YORK, First Assistant

DAVID M. KENDALL, Chairman
Opinion Committee